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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 434

GEORGIA KAOLIN COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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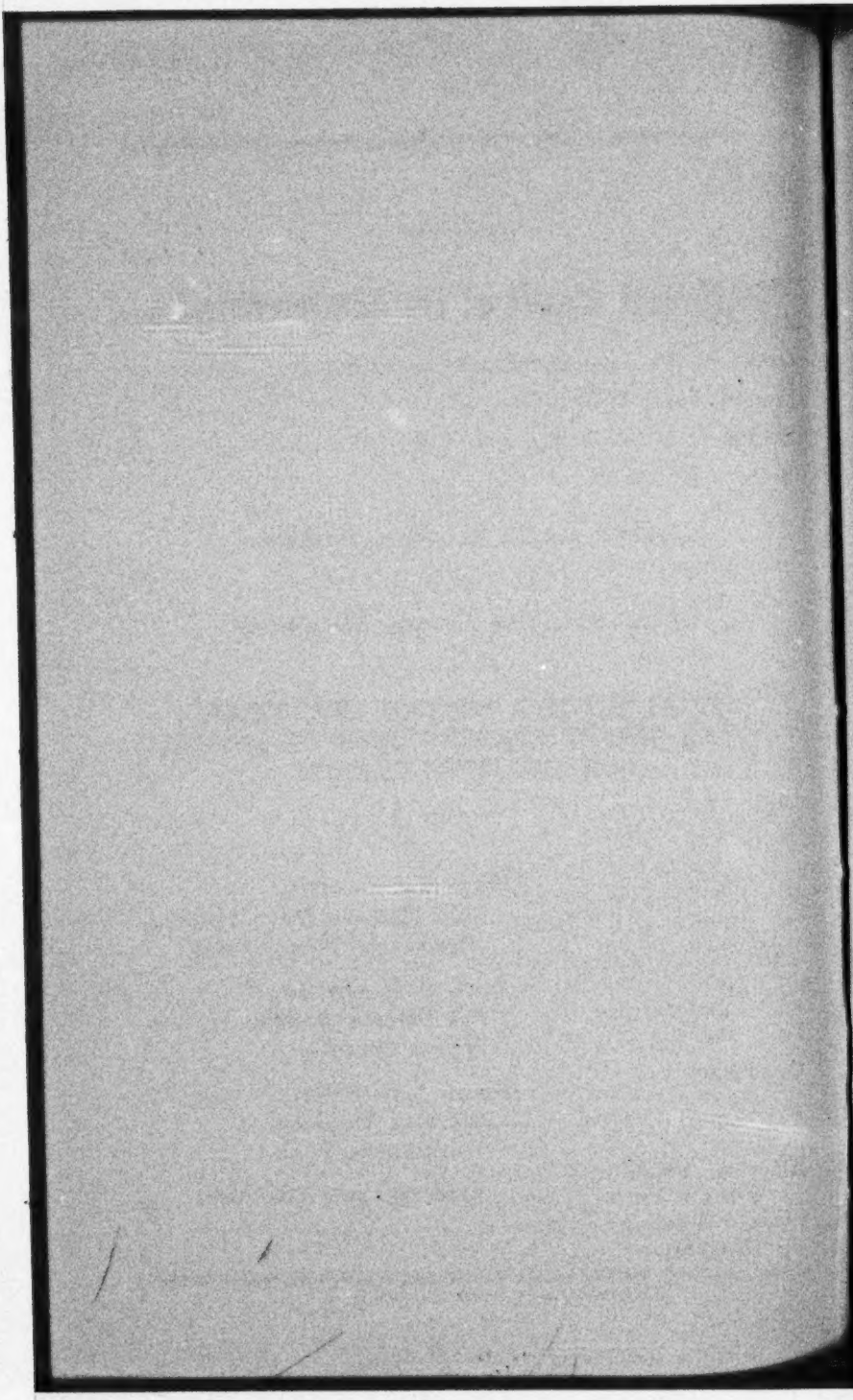

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 214 F. (2d) 284 and is reproduced in the Appendix of this petition (p. 25a, *infra*). The opinion of the District Court (captioned "Findings of Fact and Conclusions of Law") has not been officially reported but appears in the Appendix of this petition (p. 1a, *infra*).

JURISDICTION

The opinion and judgment of the Court of Appeals were filed June 23, 1954. A petition for rehearing was denied

without opinion August 5, 1954. This Court has jurisdiction under Title 28, United States Code, Section 2191(c).

QUESTIONS PRESENTED

1. Where the value of lands must be fixed as of a certain date (here, the date of a lease of the lands) and the underlying mineral deposits are a major element of value but the extent and quality of the deposits, although susceptible of measurement at the lease date, were not in fact fully measured until later, may such later measurements be ignored in determining the value at the lease date?

2. Where the lease agreement referred to in Question 1 provided that all claims for damages should be determined according to the value of the lands as of the lease date, did the lower court's refusal to consider, as an element of value, the after-developed evidence as to the quality and extent of the deposits constitute a violation of the Fifth Amendment?

3. Where the Government has used leased mineral lands for military purposes, and, in violation of the lease agreement, has returned the land to the owner with high explosive duds buried indiscriminately in the ground, and with some areas marked off as "restricted", i.e. unmineable, because of the probable concentration of buried duds therein, and the value of the "restricted" area has been found to have been totally destroyed, and while the concentration of duds in the remaining portions of the land is presumably less than in the "restricted" area, those portions cannot be mined except with armor plated equipment by procedures which are forbidden by the Army for military personnel outside of battle zones, can those portions of the land be lawfully found to have any greater value than the "restricted" area? Is the possibility of mining those portions of the land under such conditions a mitigation of the damage to the land?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution is here involved. Its text is set out in Appendix, p. 32a, *infra*.

There is also involved an Act of Congress (an enabling statute) June 19, 1948, 62 Stat. 566, conferring jurisdiction upon the United States District Court for the Middle District of Georgia for this petitioner and all other lessors of lands for Camp Wheeler. This is set out in Appendix, p. 29a, *infra*.

STATEMENT OF THE CASE

(a) This is a civil action for damage to mineral lands of petitioner caused by the United States during its occupancy of the lands under a lease agreement and its use thereof as part of the military establishment at Camp Wheeler, Georgia.

The action was brought in the Middle District of Georgia pursuant to an enabling statute conferring jurisdiction on the United States District Court for that District for all the lessors of lands for Camp Wheeler (Appendix, p. 29a, *infra*).

Ten other cases, brought under the statute by other lessors, are awaiting trial.

The lease here involved, like those made by owners of the adjacent properties, was made with the City of Macon, Georgia, the City subleasing to the United States. The enabling statute provided that suits for damages to the leased properties might be brought directly against the United States.

Petitioner's amended complaint alleged that the fair value of the lands at the date of the lease was $1,261,000; that respondent's breach had rendered them worthless; and that petitioner's damage was the diminution in the value of the property, namely, $1,261,000. In accordance with the terms of the enabling statute, the case was tried without a jury. The trial judge found for petitioner, but

only in the amount of $22,537.50. This low figure stemmed from his refusal to take into account the extent and quality of the mineral deposits (which were not precisely measured until after the lease date) as an element of value in fixing the value of the lands as of the lease date.

(b) Petitioner's business is the mining and refining of kaolin (china clay). It acquired the lands here involved, consisting of two adjoining tracts aggregating 845 acres, for future use in that business. Kaolin deposits in that part of Georgia lie beneath the surface and the overlying earth must be stripped off in order to get at the kaolin, but test borings made in both tracts before their acquisition by petitioner had proved the presence of substantial deposits of commercial quality.

The lease was for a merely nominal consideration—a dollar a year. It provided (with certain exceptions not pertinent here) that the property should be restored to its original condition at the end of the lease term.

(c) Respondent breached the lease agreement in that it failed to restore the property to its original condition at the end of the lease term. During its occupancy, the Army used the land as a practice area and fired innumerable artillery shells into it, many of them containing lethal charges of TNT. Some of them did not explode; these are called "duds". Some of the duds remained on the surface while others buried themselves to depths up to six feet.

It is conceded that the lands were contaminated with duds when the training program at Camp Wheeler was closed. Respondent ostensibly decontaminated it before returning it to petitioner but did not do so in fact. As soon as the lands had been returned to petitioner it sent workmen in to survey for a mine road. Their work was interrupted by the explosion of duds and petitioner was ordered to vacate the land. Repeated searches for duds were then made by Army personnel and by contractors engaged by the Government, but those searches were of the surface

only, since it was and is impossible to locate the buried duds. (Surface erosion resulting from rainfall may expose a dud, but only where the terrain is fortuitously right for this; it may bury other duds deeper).

The searches admittedly failed to restore the property to its original condition. The Army ultimately classified 56 acres as "restricted", admitting that acreage to be so infested with unexploded shells and missiles as to be unminable and unsafe. Army bomb disposal experts who testified for respondent refused to say that the land outside the restricted acreage was dud-free, or that it was safe.

(d) The Army Manual warns that even "to move or roll an unexploded fixed projectile is to invite disaster"; that "amateurs should leave duds strictly alone"; that they should be exploded only by "personnel who are thoroughly familiar with the dangers of such an operation and who are qualified to do the work"; and that "personnel should never be within 300 feet of a projectile when it explodes, even if suitable protection is at hand". See Appendix, p. 31a, *infra*. And the Army's order to petitioner was, and still is, to stay away from any dud that may be found, and to send for an Army expert to explode it.

One of the experts who directed the searching advised petitioner that while everything that could be done had been done, the lands were not safe and could not be made safe. Petitioner tried, experimentally, to clear a small area by sowing it with spaced charges of dynamite and exploding them, but the Army experts condemned that method as likewise unsafe.

Deeming that any attempt to mine the property would be in disregard of the lives and safety of its workmen, petitioner abandoned its plans to mine the property. This action was brought thereafter.

(e) Army bomb disposal experts testified at the trial that earth-moving machines called "bulldozers", equipped with armor plate, had been used in wartime, e.g. to clear

the invasion beaches of duds prior to the mass landing of troops. They said that if such armor-plated bulldozers were used to strip the land here involved the bulldozer blade and the armor plate would deflect away from the operator the force of any explosion resulting from the bulldozer striking a dud.

So far as is known, armored bulldozers have never been used for peacetime mining pursuits, their use for moving duds being confined to the clearing of battle areas by the armed forces. Respondent did not use them in its purported clearing of these lands.

The third question presented by petitioner arises here. The trial judge "gravitated toward" and "finally reached" the conclusion that the lands outside the restricted areas are "approximately", say "ninety-nine percent", free of duds and explosives and that the overburden can be safely removed "if the machinery with which it is removed is provided with protective steel, as outlined and recommended by the experts". It was not pretended that such a scheme conforms with the requirements of the Army Manual for the disposal of duds; to the contrary, it is undisputed that the scheme violates those requirements (see p. 31a, *infra*). Moreover, the undisputed evidence is that employees simply will not work under such conditions, particularly since the scheme makes no pretense of protecting other workmen in the area (and see Appendix, p. 31a, *infra*), and the trial judge concluded:

> "Notwithstanding my conclusion that fundamentally the lands are approximately free from harmful and dangerous missiles, there is the belief definitely fixed in the mind of the owner and in the minds of the public that there are located on the lands duds and unexploded shells and missiles, and that the working of the same, and particularly the removing of the overburden on the same, would be hazardous and dangerous, and this conception in the minds of the owner and the public to my mind, certainly and definitely diminishes the market value to the extent of fifty per cent."

Since the explosion of a single dud could kill or maim one or more employees (or trespassers), mere "approximate" freedom from duds does not make the land a normally safe place. And the Army's setting off of the restricted areas (p. 5, *supra*) from the remainder of the lands was not based on any conclusion that the remainder was safe, but solely on the relative concentrations of duds, so that, as one of respondent's bomb disposal experts testifies, "instead of running over one 60 mm. mortar at a time, you may run into two or three".

In view of the admitted destruction of the entire value of the restricted areas because of the duds which are buried there, can the remaining areas be accorded any greater value simply because the duds therein are less concentrated, having in mind the measure of responsibility imposed by law upon the owners of premises where explosives are located? Is the owner required to mitigate his damage by the practices of the battlefield, or to subject his workmen to conditions which the military will not tolerate for its own personnel outside of active battle zones?

(f) The lease agreement (like the leases involved in all the other pending cases) provided that any claims for damage were to be determined "according to the value of said premises as of the date of this lease", and not upon the basis of any appreciated value resulting from respondent's use or development of the property or the surrounding area. Both courts below held that the measure of petitioner's damage was the difference between the value of the land at the lease date and the diminished value resulting from the breach, and that the "value" contemplated by the parties was "market value" at the date of the lease.

It is in the fixing of the market value as of the date of the lease that the first question presented by this petition arises. The lands were known to be kaolin lands by all concerned when the lease was executed but the full extent and quality of the deposit had not been determined. Both

parties made extensive test borings after this action was commenced and the extent and quality of the deposit was determined by a court-appointed scientist from all the test data thus obtained. Those determinations established this land as containing the largest known deposit of kaolin, and that the deposit is of high quality. The evidence as to the exploration and the evaluation of the results was allowed to go into the record, but was excluded from consideration in the fixing of the market value.

The trial judge said that in arriving at the amount which petitioner is entitled to recover because of the Government's breach "we use the same general methods and rely upon the same legal principles as are controlling in condemnation cases". In making his determination, however, he excluded the later determined facts which evidence the major element of value on the ground that such consideration was barred by the provision of the lease that all claims for damages thereunder are determinable according to the value of the premises "as of the date of this lease". Similarly, the Court of Appeals recognized that the existence of mineral deposits in condemned land may be taken into consideration in fixing value "if and insofar as it influences the market value of the land" but held that the trial judge had taken into account the elements properly entering into "the fair market value of these lands as of the date of the lease" and that his findings and conclusions were "correct and sound".

The holdings below are contrary to the rule in condemnation cases, wherein it is uniformly held that the value of mineral deposits discovered after the date of the taking must be taken into account in fixing the damages. The trial judge quoted from one of the condemnation cases holding this, and referred to it as "respectable authority", but despite his enounced belief that the same legal principles apply here as in condemnation cases, he refused to consider the after-developed evidence because he was obliged to fix the value "as of the date of this lease", apparently overlooking the fact that condemnation cases

are precisely analogous in that courts are required therein to fix the value as of the date of the taking, which, in the situations here referred to, is prior to the discovery of the mineral deposit.

The trial judge stated that if petitioner was right in its contentions "it has suffered heavy loss which this judgment will not compensate".

The deposit of kaolin in the leased lands is just the same in quantity and quality and value now as it was on the lease date. The refusal of the lower courts to consider the facts regarding it has resulted in the fixing of a value which is only a fraction of that which would have been found if petitioner had compelled respondent to condemn the land, and is a grossly inadequate award of damages which does not begin to place petitioner in as good position as it would have been if the breach had not occurred.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

(1) *The Court of Appeals has decided important questions of federal law which have not been, but ought to be, decided by this Court:* The construction of contracts through which the United States is exercising its Constitutional functions, and their consequences on the rights and obligations of the parties, presents important questions of federal law; *United States* v. *Allegheny County*, 322 U.S. 174, 183. Here the United States was exercising Constitutional functions in connection with the armed forces. The questions here presented are important not only to a just disposition of the case at bar, but also to the disposition of the other Camp Wheeler cases now pending. Also, they should be settled by this Court so that property owners may know for the future whether they may safely enter into lease agreements with the Government or must compel it to proceed by way of condemnation if it needs to use their properties.

(2) *The action of the Court of Appeals raises a Constitutional question which ought to be decided by this Court:* The Government's breach of its covenant to restore the property to its original condition deprived petitioners of the intended use of the property, namely as minable kaolin lands, without the just compensation guaranteed by the Fifth Amendment. This constitutes a taking of the lands; *United States* v. *General Motors Corp.* (1945), 323 U.S. 373; *Richards* v. *Washington Terminal Company* (1914), 233 U.S. 546; *United States* v. *Welch* (1910), 217 U.S. 333. Surely it is not just compensation to base the award of damages on the limited knowledge available as to a major element of value at the time of the taking in lieu of full and complete knowledge developed thereafter.

The undisputed evidence is that the markers for the test drillings made by petitioners prior to leasing did not survive the Army's shelling of the land. Petitioners were thereby deprived of the use of the data regarding those drillings in making its measurements of the deposits. The refusal to permit petitioners to resort to subsequent test drillings as a basis of measurement thus puts the Government in the position of profiting by its own wrong.

The questions are whether a provision of a lease, made for a mere nominal consideration, specifying that claims for damages shall be fixed according to the value at the lease date, deprives the owner of the right to prove an element of value that he would undoubtedly have had the right to prove if, instead of complying with the Government's request for immediate possession under a lease, he had forced the Government to proceed by way of condemnation, and whether the limitation of the award on that ground is not as much a taking without just compensation as it would have been in the absence of the lease provision.

These questions should be decided by this Court not only because of its importance in this case and the other pending cases, but also because of its effect upon the pattern of Government use and acquisitions of lands in the future on terms which are just and equitable to those with whom it deals.

(3) *The holding below is in conflict with the principles for the fixing of market value as declared by this Court in Olson* v. *United States, 292 U.S. 246, 245-5:* The *Olson* case was a condemnation case. It held that the measure of compensation for the taking of private property is "the market value of the property at the time of the taking" and that it includes all elements of value that "inhere" in the property. It is tacit in the opinions below that if petitioner had refused to lease the land and had forced the Government to condemn it, evidence as to the kaolin deposits would have been given effect in determining "the market value of the property at the time of the taking", even though the facts as to the quality and extent of the deposits were not developed until a later date. The elements that go into the fixing of market value should be no different in an action for breach of covenant than in a condemnation proceeding.

The *Olson* case reiterates that one of the tests of the integrity of a Government is the sufficiency of the compensation it makes for the taking of private property. It is important to the security of all who deal with the Government that this Court definitively settle the questions here presented.

(4) *The decision below is in conflict with the decision in the courts of three states.* Those decisions were not based upon state law and the questions decided were not merely local; in essence they decided the same questions as those posed by question 1 of this petition.

There is conflict with the Supreme Court of Idaho in *Tyson Creek R. Co.* v. *Empire Mill Co.,* (1918) 31 Idaho 580, 174 Pac. 1004. In that case the owners of condemned land alleged the discovery of gold after the condemnation date. The trial court instructed the jury that it should not consider any increased value by reason of these discoveries except insofar as the market value of the land at the date of the summons was affected by the presence of the min-

eral deposits. The Supreme Court of Idaho held this instruction to be error, saying (p. 587):

> "Actual value is market value when the true conditions are fully disclosed .... The gold, the presence of which was disclosed by prospecting after the summons was served, was in the ground at and prior to that date. It was and is the property of the appellants, and if it is in quantity and condition to be profitably mined, they were entitled to show that fact in order to obtain just compensation .... although its actual condition was discovered after the summons was served upon them."

There is a conflict with the decision of the Supreme Court of California in *City of Los Angeles* v. *Pomeroy*, (1889) 124 Cal. 597, 57 Pac. 585, which involved a condemnation of land for water supply purposes.

There is conflict with three decisions of the Appellate Division of the Supreme Court of New York State. The opinion of the trial judge below quotes *In re Board of Water Supply of City of New York*, Parcel 801 Coykendahl Quarry, 209 App. Div. 231, 205 N. Y. Supp. 237 (*infra*, p. 22a). The decisions below are in conflict with the *Coykendahl* case, as well as with later decisions of the New York courts; *Sparkill Realty Corp.* v. *State*, 254 App. Div. 78, 4 N.Y.S. (2d) 679; *Huie et al.* v. *Campbell et al.*, 281 App. Div. 275, 121 N.Y.S. 86. These cases state the law of New York; they could not have been taken as of right to the New York Court of Appeals because of Sections 588 and 589 of the New York Civil Practice Act.

(5) *The decision below conflicts in principle with the decisions of other United States Courts of Appeals:* The responsibility of petitioner respecting these lands is surely no less than that of the Government in respect of military land as stated in *Stewart* v. *United States*, (C.A. 7, 1951) 186 F.(2d) 627. In that case injuries were sustained by trespassers upon the premises of Fort Sheridan, Illinois, by the explosion of a hand grenade which they had unlaw-

fully taken from its place of storage. It was held that the degree of care imposed in such case was "decreed both by statute and by the courts based on common law principles" and that "The owner of a commodity so inherently dangerous as nitroglycerin is required to exert the highest degree of care to keep it in close custody to prevent its doing mischief, and that duty never ceases; and such owner is liable for all the natural and probable consequences which flow from any breach of that duty", and that it was not a sufficient compliance with the rule to store the grenades inside a six-foot wire fence surmounted by barbed wire.

In *Exner* v. *Sherman Power Const. Co.*, (C.A. 2, 1931) 54 F.(2d) 510, it was held that "Dynamite is of the class of elements which one who stores or uses in such a locality, or under such circumstances as to cause likelihood of risk to others, stores, or uses at his peril. He is an insurer, and is absolutely liable if damage results to third persons", and that there is "no reason for imposing a different liability for the results of an explosion, whether the dynamite explodes when stored or when employed in blasting".

Neither of the cases just cited involved any question of reduction in the value of land by the creation of a permanent condition violative of the obligations of land owners upon which explosives are present. There can be no doubt, however, that such obligations have been saddled upon petitioner by respondent's breach, and that the principles of the cited cases have been contravened by the decision below.

Assuming *arguendo* that the land can be stripped of the dud-infested soil by the hazardous use of armor-plated bulldozers, the question is whether such a scheme is one to which petitioner, as a matter of law, is compelled to resort in mitigation of its damages. In remitting petitioner to this scheme as a way of mining its property, the lower courts not only saddled upon petitioner the responsibility of subjecting its workmen to procedures interdicted by the Army Manual (if petitioner is to mine the property

at all), but also handed down a requirement in conflict with the decisions, in two other circuits, that an injured party is not required to adopt risky and untried procedures in order to mitigate his damage; *American Smelting & Refining Co.* v. *Riverside Dairy & Stock Farm,* (C.A. 8, 1916) 236 Fed. 510, 514-5; *Chicago Bonding & Surety Co.* v. *Augusta-Savannah Navigation Co.,* (C.A. 7, 1918) 250 Fed. 616, 617; *Sandusky Portland Cement Co.* v. *Dixon Pure Ice Co.,* (C.A. 7, 1918) 251 Fed. 506, 509.

The armored bulldozer scheme is a battlefield expedient which has never been used in peacetime mining operations. Its use therein would subject the workmen to risks which military personnel are forbidden to take outside of battle areas (p. 5, *supra*), and see *Mather* v. *Rillston,* (1895) 156 U.S. 391, 399. This Court should decide whether, as an aftermath of war, landowners who have given their property freely to the Government for its purposes, and upon its promise to return it in safe condition, are to suffer loss of the real value of the property, or, alternatively, subject their workmen to conditions that are wholly foreign to pre-war concepts. A decision on that question is important to this case and to the ten other "Camp Wheeler" cases, and as a guide for the future in view of the country's indicated long-time military requirements.

(6) *There was such a departure by the Court of Appeals from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision:* Despite the great length of the record and the importance and complexity of the issues involved, the Court of Appeals allowed petitioner only fifteen minutes total time for its opening and closing arguments. (Compare this Court's Rule 45.) Rule 25 of that Court (reproduced in Appendix, p. 33a, *infra*) provides for an hour's time unless the court deems that a lesser time will suffice for a fair presentation of the questions involved. Petitioners requested forty-five minutes (and compare this Court's Rule 45). Petitioners were denied this, not on the

ground that the court thought that fifteen minutes would be adequate, but because one of the judges wanted to catch a train and that meant that the court would rise at noon and would limit the time of all cases scheduled that morning to fifteen minutes a side on each case. Petitioner was thus deprived of the right to present its case adequately.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

Civil Action No. 661

GEORGIA KAOLIN COMPANY, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

In October, 1940, the day of the month is blank, the plaintiff leased to the City of Macon, for a term of years and for the consideration set forth in the lease, two certain parcels of land, which will hereinafter be referred to as "the Willingham-Birdsey Tract" and "the Asbell Tract."

The Willingham-Birdsey tract, consisting of 670 acres, was purchased by the plaintiff in April, 1940, under a sealed bid. The owner of this tract, prior to its sale to the plaintiff, deciding to sell, invited the public generally, and particularly the Kaolin Industry, to submit bids. The officials of the plaintiff learned that the land would be sold in that manner on Thursday prior to the Tuesday when the bids or offers to purchase were to be submitted, and hastily and somewhat casually made an examination of the lands, to determine whether or not they contained kaolin, and whether or not, therefore, it would be interested in making a bid. The plaintiff, during that interim, drilled thirty-five holes, in ten of which it found kaolin, in twelve of which it struck rock, and in thirteen of which it found no kaolin.

Based upon the fact that these lands were located in the kaolin section, that the terrain indicated the possibility of kaolin, and fortified with the knowledge that the preliminary drilling showed the existence of kaolin in ten out of thirty-five holes, to use the language of the President, the Plaintiff Company "thought it worth taking a gamble,"

and submitted a sealed bid of $25,000.00 for the 670 acres, and was the successful bidder, and this tract was, therefore, purchased by the plaintiff at that time for said price. There was another bid in a like sum, but the plaintiff agreeing to take care of the broker's fees and commissions, it was declared the highest and best bidder.

The Asbell tract consists of 175 acres and was purchased by the plaintiff in 1929. The plaintiff acquired on the same date it acquired the Asbell tract, and in the same deed, 65 acres, known as the Lowe tract, the mineral rights, in what was referred to in the evidence as the DeFore tract, and three rights of way, for all of which plaintiff paid the sum of $40,000.00.

At the time the lease was entered into in October, 1940, between the plaintiff and the City of Macon, it was understood by the plaintiff and the lessee that the lease would be transferred to and the lands used by the Government as a military training base. The lease agreement provides that the lease may be transferred and assigned, or subleased, "to the United States, or its agency, for military purposes," and paragraph 4 of plaintiff's petition alleges, among other things, that the "plaintiff entered into a lease with said city (Macon) for certain of its properties, which would be turned over to the defendant (United States) for part of its maneuver area to be used for the training of defendant's soldiers in preparation for war."

There is *some* evidence intimating that the plaintiff was somewhat loathe to lease its property to be used for military purposes, and that during the negotiations, when representatives of the City and the Government were present, some direct or implied threat of condemnation was made, and the President of the Company stated at that time that if condemnation were resorted to, they would be undertaking to condemn property worth $1,000,000.00. Notwithstanding the plaintiff's lack of enthusiasm in leasing the property for an indefinite period for military purposes, *at $1.00 per year*, it finally entered into the

contract, with full knowledge of all its terms and the purpose for which the property was to be used, and it is bound by the contract. There is not the slightest effort shown on the part of the plaintiff to avoid the contract because of any intimation of condemnation, but this by-play is related at the insistence of the plaintiff, to show, if it does, that at the time it took charge of the property, the defendant was advised of its very high worth and value.

The contract of lease contained the following pertinent provisions, to-wit:

That the lessee would "restore the premises to the same condition as that existing at the time of the entering upon the same under this lease, reasonable and ordinary wear and tear and damage *by the elements* or by circumstances over which the *lessee* had no control, excepted."

And, second, the lease provided further, in paragraph 6, that "Any and all claims for damages to the leased premises and under the terms hereof are *determinable according to the value of said premises* As of the Date of This Lease, and no such damage shall be determined upon the basis of *appreciated* value of said premises *occasioned by the use* of and/or development upon said property or surrounding properties by the lessee, successor, assigns, or subleases."

The lease further provided that if the same was transferred or sublet to the United States or some agency designated by it, that the lessor would have the right "to assert such claim for damages exclusively and solely against said sublessee."

Under the transferred contract of lease, the United States went upon said property and took possession the latter part of October, 1940, and retained and used the same until February 15, 1947, when the lease contract was duly terminated.

When the Government had no further need for the lands and they were returned to the owner February 15, 1947, negotiations commenced between the owner and the United

States in an effort to determine the extent the land had been damaged, if any, while being used by the defendant. After considerable negotiations, the owner was invited to file a claim, which was done on April 7, 1947. In this claim, the owner contended that the Asbell tract had been damaged $20,000.00, and the Willingham-Birdsey tract $175,000.00. The United States declined to pay the claim for either or both tracts, and, after further conferences, it appeared that it was impossible to reach an agreement and that the owner would be required to submit its claim to the Court of Claims.

The plaintiff and others interested in the alleged damage to value of lands owned by them and used as a military site at Camp Wheeler *obtained the passage of a bill* in Congress, approved June 19, 1948, being Public Law 730 of the 80th Congress, the caption of which is as follows: "... to confer jurisdiction upon the District Court of the United States for the Middle District of Georgia, and authorizing it to hear and determine and render judgment on all the claims of the owners of the fee simple titles and leasehold interests in lands leased to the United States by the City of Macon, Georgia, for use as a part of the site of Camp Wheeler, Georgia."

Under authority of Public Law 730 of the 80th Congress, the plaintiff filed suit against the United States on the 30th day of May, 1949, alleging that the Government, under said lease and while in its possession, had used the lands for a maneuver area and a firing range, and that practically the entire area, including both tracts, had been shot over by the military forces, with guns, mortars and other explosives. That the firing and dropping of shells on said area during the period it was occupied by the defendant caused the property to become impregnated and covered with live shells, duds, dangerous explosives and missiles to such an extent that the plaintiff could not thereafter use the lands for mining purposes. Plaintiff further alleged that it was engaged in the mining of kaolin and

acquired said property for that purpose, and that the value of the lands and the kaolin thereon had been completely destroyed. The plaintiff further alleged that, the defendant having used said lands for a firing range or ranges and leaving large quantities of live and dangerous duds and missiles, that it failed to restore the premises to the same condition as when entered, and had breached its contract, and, therefore, was liable to the plaintiff for the damages done to the property.

The plaintiff further alleged, in paragraph 12, that in the restricted areas, which will be dealt with hereinafter, there were 596,420 tons of clay, which had a market value of 20¢ per ton and was worth the sum of $119,234.00, and that the remaining portion of said property described and covered in the lease had been damaged and decreased in value in the amount of $2,011,870.00.

On August 21st, after the case had been on trial for several days, the plaintiff amended its position by striking the paragraph containing the figures embracing the damages sued for, and substituted therefor the following:

> "Plaintiff shows that the fair value of the lands as described in the position when said lease to the City of Macon was entered into with the plaintiff, and which was assigned to the defendant in October, 1940, was the sum of $1,261,000.00, and the acts of the Government during the occupancy of said land made it impossible for the plaintiff now or at any time in the future to use said lands for the purpose for which the same were intended, to-wit, the mining of kaolin, and the plaintiff has abandoned the same for said purpose. Plaintiff avers that said lands by reason of the acts of the Government as hereinbefore alleged is entirely worthless, and plaintiff has been damaged by reason of the failure of the Government to restore said property, as provided in the lease contract between the plaintiff and the City of Macon, which was assigned to the defendant, in said sum of $1,261,000.00, for which plaintiff sues and asks judgment of the court."

The defendant, answering the petition contends that the plaintiff, if entitled to recover at all, is not entitled to recover for the land *on a per ton basis for the kaolin in said lands,* but the legal damages and the yardstick by which they should be measured, *is the market value of the lands at the time they were taken over by* the Government *and the diminution of that value* by reason of the Government's use thereof. The defendant further contends that only a portion of the area was used as a firing range and that the place had been effectively and completely dedudded, and that there are no live or dangerous, unexploded shells or missiles on or imbedded in said lands, and if there were any except as to the restricted areas, it is insignificant, and that the property could be used for mining purposes or any other purpose. The defendant further contends that if the plaintiff is entitled to recover on a per tonnage basis of kaolin, that there is nothing like the amount of merchantable kaolin in the lands as is contended by the plaintiff.

The *plaintiff's* evidence discloses that in the particular section of Georgia wherein these lands are located, the principal Kaolin Industry of the country exists; that the area of commercial kaolin is rather limited, and that kaolin lands are quite valuable.

It is conceded that both tracts of land were acquired for kaolin purposes. The plaintiff is in the kaolin business, and these lands were acquired in the belief that they contained kaolin.

During the period of the occupancy of these lands by the defendant, large numbers of troops were stationed and trained at Camp Wheeler. It was an Infantry Placement Training Center or Unit, and approximately on the average of 14,000 soldiers were at all times in training.

There were two Gun Implacements on or near each side of the tract, and the practice firing was generally directed *at a hill* somewhat in the center of the area and described as the "impacted area" for training purposes. Three

large types of guns were used, the 60 millimeter, the 81 millimeter, and the 105 howitzer.

During the *six years and four months* that the property was occupied by the defendant, a great number of shells of all types were fired on the premises; the records do not show the vast number, but certainly many *thousands of all types*. It also appears that hand and rifle grenades were used, but little if any complaint was made of this by the plaintiff.

After the defendant returned the lands to the plaintiff, it contended that in working over the lands, viewing the premises, constructing roadways and otherwise, it discovered that the lands were so impregnated and filled with duds and unexploded shells and missiles, that it was so unsafe as to be worthless; that subsequently, and in '49, '50 and '51, a concerted and thorough exploration of the lands was made to determine the amount of kaolin therein, the depth of the overburden and its character, and the type and character of clay. The plaintiff, through a contractor, Pennsylvania Company, employed by it, drilled on the Willingham area approximately one hundred and seven (107) holes and took borings from each. It also drilled on the Asbell lands thirty-two (32) holes, from which it took borings. The plaintiff claims that from these drillings and the borings taken and analyzed, that it was possible to tell with almost precise certainty the area containing kaolin, the depth of the overburden, and the type, as to whether ordinary dirt and clay or limerock, and the depth and breadth of the strata of the kaolin.

The plaintiff showed that on the Willingham tract there were over 10,000,000 square feet of kaolin, amounting to approximately 239.5 acres; that there were 23,500,000 cubic feet of overburden, 5,092,000 yards of clay, with an average overburden depth ratio of 4.62 feet to one.

The evidence of plaintiff also disclosed that on the Asbell property there were 2,481,000 square feet of kaolin lands, amounting to approximately 57 acres; that there were three

and a quarter million cubic years of overburden and 1,287,000 yards of clay, with an average overburden ratio of 2.52 feet to one.

The evidence of the plaintiff disclosed that clay of the type discovered, located accessible to transportation and at a short distance from the plant, was worth approximately 20¢ per square yard on a royalty basis.

In addition to the No. 1 clays embraced in the figures and calculations above set forth, plaintiff showed there was a great deal of No. 2 clays. No. 2 clays, according to experts, contain from six to fifty per cent foreign matter and are of a color less than "78 bright."

The plaintiff's President testified that on account of the unsafe and unfit condition the premises were left in, that to attempt to work the same, particularly take the overburden therefrom, would be an unauthorized and *all but inhuman disregard of life and limb*, and that it was the purpose of his Company to, and as a matter of fact, the properties had already been abandoned.

Plaintiff contended, therefore, that the total value of the *land, that is, the value of the kaolin*, had been completely destroyed, and that the defendant was liable for such destruction, and that it was entitled to judgment against the defendant in the sum of $1,261,000.00.

The defendant's evidence agreed that a great number of soldiers in approximate numbers of 14,000 at a time had been trained on this Infantry Placement Training Center during this six-odd years, and that a great many rounds of ammunition had been fired in this training. Its evidence, however, disclosed that when firing training was in progress, *some one was charged with the responsibility of noting whether or not the shell exploded*, either when it came in contact with the ground or by delayed fuse, according to the make of the shell, and after each round of training, experts or demolition squads were sent to the impacted area or wherever duds might be located, and they were gathered up and not permitted to remain on the land. The

defendant's evidence further disclosed that several types of shells were used, a large percentage of which were harmless and were called "practice" and "smoke shells."

It also appeared from the defendant's evidence that when more than five per cent of the shells of any type failed to explode, the remainder of the lot was not used and was sent to the Ordnance Department.

The defendant further contended that prior to the return of the property to the owner, it sent experts and demolition squads over the lands *several* times, searching for unexploded duds, missiles and shells, and that in the *opinion* of the experts in that field, the land of both tracts had been dedudded and was safe for use, except two tracts in the impacted area, consisting of one tract referred to as tract No. 1 of 35.1 acres, and tract No. 2, consisting of 21.4 acres. The defendant further contended that in the construction of numerous miles of highway over and across the land, in which it was necessary to cut the hills and fill the low places, and in the drilling of approximately one hundred and forty (140) holes, using heavy machinery, that no one had been injured, and that no dud had exploded, which was additional proof that the land was free of dangerous and unexploded duds.

The evidence of the plaintiff disclosed that as an experiment and in order to remove the overburden, and so as to determine with certainty the amount of clay, it had the overburden removed from five acres of land, but the cost of removing the first six feet was prohibitive, it being required to pay 57¢ per yard. The contractors conceived and used the method of drilling holes with air pressure three feet apart and three feet deep and placing therein a stick of dynamite, and when a considerable area had been so arranged, the dynamite would be simultaneously exploded, in the belief that the explosive jars of the dynamite would explode any live duds underneath the soil, and if it were not exploded, it would tear it out to where it would be visible.

The Government experts, who had had a great deal of training and experience, both at home and abroad, one of whom had cleared the Normandy beaches for the invasion forces, declared that the use of dynamite was useless and worthless, except that if a dud was buried it might blow it out of the ground. It seemed that in order to explode a live dud by impact, it is necessary for the explosion to be in direct contact with the dud, and of such tremendous force as to break the shield around the explosive matter in the dud.

The evidence of the defendant disclosed that the 105 howitzers, if hit at a right angle, penetrated the ground to a maximum of five and one-half feet. Shells of the 60 and light 81 millimeter mortars would not completely bury themselves and would be visible from inspection, but the 81 heavies would bury themselves to a maximum of three feet.

After the dedudding was done, the United States believed the property to be in safe condition. The owners were advised, however, that at any time duds of any kind were found or discovered, they should call the Engineer's Office at Savannah, and experts would be dispatched promptly. *This was done several times. Most* of the duds discovered by the owner were inert and harmless. *Some few were alive and dangerous.* All were cleared and the live ones destroyed.

Captain Edwin DeKarski, with fourteen years of experience in the Ordnance Department with disposal and demolition squads and bomb disposal units, having worked in Italy and Okinawa, abroad, and, in Benning, Bragg, Stewart and Rucker, and other places in this country, after aiding in dedudding the lands, carefully inspecting them, *believed* that the area was entirely safe, except the restricted area, particularly if the precautions of having the bulldozer protected by steel were used, as he suggested.

Major Joseph A. Bocelota, with long and varied experience in bomb disposal, having had experience in a great

many camps on the American Continent and abroad, and having dedudded the beaches at Normandy for the invasion, was of the *opinion* that the area was safe, particularly if protective precautions were used.

E. L. Witcham, of the W. T. Anderson Company, dirt moving contractors, having had long experience and fully familiar with the purpose for which the land was purchased and the use to which it had been subjected to by the Military, thought slight possibility of live duds, insisted and stated he would have no hesitancy whatever in moving the overburden with his equipment protected, and that the cost of protecting the equipment for removing the upper strata of the overburden would not exceed $400.00.

The defendant took the position and was insistent that the method suggested by the plaintiff for arriving at the damage done by ascertaining the cubic yards of clay in the ground and multiplying by its royalty value was not the correct method. It further contended, however, that even if it were, the *plaintiff's estimate of the amount of clay in the ground was entirely incorrect and highly exaggerated.* It further contended that the exploration done by the plaintiff was insufficient to predicate any definite figures as to amount, number of acres containing kaolin, thickness of the strata, and depth of the overburden. It contended that *much more extensive drilling* and *more* examination would be necessary. It further contended, and its evidence disclosed, that the area only contained, according to its estimate, about 1,694,469 yards of clay and that much of the clay was sufficiently contaminated and off-color to be worthless. It further contended that much of the clay embraced within the plaintiff's estimate was covered too deeply with overburden to be profitable to move and that the ratio of overburden to the clay was so out of proportion as to make that particular type or area worthless.

I have very briefly outlined the contentions of the respective parties, and but very slightly touched upon the evidence produced to sustain their respective contentions.

No reasonable amount of effort, time or expense has been spared by the parties to this cause in order to present evidence that would substantiate their respective claims. The taking of the evidence has consumed several days, and was given by experts and non-experts. Every available theory involved in all the issues was fully explored.

Out of the maze and multitude of this evidence, it is my duty to pick out, glean and discover, if humanly possible, the truth of the facts and to apply those facts as thus discovered to the law applicable.

The question of the measure of damages, that is, the yardstick by which we should be governed in ascertaining the amount of the damages to which the plaintiff is entitled, is, to my mind, not so exceedingly difficult. Considerable discussion was had, much argument and debate, and citation of authorities was given by both sides. The plaintiff zealously contended that the plaintiff ought to be paid for the full value of the kaolin in the ground, arrived at in money per ton, on a comparable royalty money basis. It did not contend that it was entitled to recover the value of the kaolin in a finished product. It realized that too many conjectures exist and that a computation of that method would involve perspective, vague and remote contingencies.

The plaintiff did insist, however, that it had established by competent evidence the number of tons of No. 1 and No. 2 types of kaolin, and that kaolin in October, 1940, had a provable and merchantable value on a royalty basis, and that the established yardage in the ground at the royalty price at the time of the contract would amount to the sum sued for.

The defendant contended with equal force and vigor that the tonnage and royalty basis for establishing damages to the plaintiff was not the legal method. The defendant contended that the question of value of the lands at the time they were leased to the Government was the market value for any and all such purposes and uses to which the lands might be legitimately put, and that while the fact that the lands contained kaolin should be given considera-

tion, that it could not be considered separate and apart from the lands, and that the kaolin was simply one of the many elements that went to make up its value.

I agree with the defendant. The general rule seems to be most universal that the measure to be applied is the market value of the lands. Of course, in rounding out the market value, we take into consideration the fact that the lands contained and were known as kaolin lands, and any and all other elements that would go into its market value at the time. It is conceded by the plaintiff and the defendant that the best and most valuable purpose for which the lands could be used at the time of the Government's acquirement thereof was the mining of kaolin. They were not bought or sold as farm or pasture lands. The lands were located in a kaolin section; thirty-five borings were made and it was known that kaolin existed, and they were bought and sold as kaolin lands.

In arriving at the amount to which the plaintiff is entitled because the Government breached its contract to restore, we use the same general methods and rely upon the same legal principles as are controlling in condemnation cases. The general rule there applied and that seems here applicable is as follows:

> "When land is taken by eminent domain, the measure of compensation to be awarded the owner is the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy," *both being informed.* In other words, the test is the fair market value.
>
> "How market value is determined depends upon a number of circumstances."
>
> 156 A. L. R., 416.
>
> "The measure of damages for breach of a contract to fill excavations on land is the difference between the market value of the land with the excavations unfilled and the value it would have been if the contract had not been breached."

Lastinger vs. City of Adel, 69 Ga. App., 535.

"An injured party cannot be placed in a better position than he would have been in if the contract had not been breached."

Lastinger, supra, 536, citing:

26 C. J. S., 566, and
15 Am. Jur., 442, par. 43.

"Proper measure of damages for permanent injury to real estate is diminution of the market value of the property as reflected by the difference between its reasonable market value immediately before and immediately after the injury."

Wise vs. U. S., 38 Fed. Sup., 131 (9). (W.D., Ky., 1941)

"Land owner's damages resulting from establishment and construction, or maintenance of military post of Fort Knox on contiguous land were not to be determined on inconvenience to landowner or change in manner of living due to disruption of community life in the territory resulting from establishment of post, although evidence of such facts would tend to substantiate testimony as to diminution in reasonable market value of the land."

Wise, supra, (10).

"In case of an injury of a permanent nature to real property, the proper measure of damages is the diminution of the market value of the property by reason of that injury, or, in other words, the difference between the value of the land before the injury and its value after the injury."

15 Am. Jur., page 517, par. 109.

"Value of land in condemnation proceedings must be determined *as of the time of the taking.*"

Murray vs. U. S., 130 Fed. (2nd), 443 (4). (C.A.D.C.)

"Market value for the purpose of condemnation proceedings is what a willing buyer would pay in cash to a willing seller."

Messer, et al., vs. U. S., 157 Fed. (2nd), (C.A. 5) 793.

"In condemnation of private property for public use, a wide variety of circumstances must be considered, including condition of property when taken, and real test on question of damages and compensation to be awarded is present value of property, not its value at some future time."

U. S. vs. Sanitary District of Chicago, (C.A. 7) et al., 149 Fed (2nd), 951 (1).

The lease contract provides:

"Any and all claims for damages to the leased premises and under the terms hereof are determinable according to the value of such premises as of the date of this lease."

Under this provision of the contract, it is my conclusion that the amount of damage to which the plaintiff is entitled to recover is the difference between *the fair market value as of October, 1940,* and the diminished value because of its use by the Government and on account of the unsafe and untenable condition of the land when the defendant returned it to the owner. In other words, if on account of the defendant's use of the property in the manner used and defendant's failure to return the same, as the contract required, in as safe condition as when leased and its value was totally destroyed, the plaintiff would be entitled to recover the full fair market value of the lands at the date of the lease. If the defendant's use and its return in the alleged unsafe condition only *partially* destroyed the value, or only destroyed value of a part of the lands, then in that event the damages should be calculated proportionately.

With respect to plaintiff's contention that it should recover on a *yardage or tonnage and royalty basis,* the court cannot agree.

"With remarkable unanimity the courts hold that in determining the compensation in eminent domain proceedings for the land to be condemned, the existence

of valuable mineral deposits in the land taken constitutes an element which may be taken into consideration if and in so far as it influences the market value of the land. The reason for this rule is that the measure of compensation in eminent domain proceedings is the market value of the land to be condemned as a whole with due consideration of all the components that make for its value. This rule has been expressed in a great number of decisions and has also been recognized by all the leading textwriters on this subject. It has been applied indiscriminately to all forms of mineral deposits, such as limestone, ore gold, fire clay, coal, sand and gravel, and stone."

156 A. L. R., 1416-17.

Plaintiff's brief contains the following statement, in which I concur:

"The construction of contracts, including the measure of damages for the breach of contracts and the principles governing the admissibility of testimony, are established by the laws of the State in which the Federal Court is sitting. Anzano vs. Metropolitan Life Insurance Co. of New York, 118 Fed. (2nd), 430. This decision passes on questions both of the construction of the contract and the admissibility of evidence."

"Where land was sought to be condemned for the right of way of a railroad, on the trial on appeal to the Superior Court from the award of the Assessors, as to the property sought to be taken, the measure of recovery was the fair market value. If it contained valuable clay deposits, that was a proper subject for consideration in determining such value, but there would not be a recovery both for the value of the land and for the clay in it as two separate items."

Atlanta Terra Cotta Co. vs. Georgia Ry. & El. Co., 132 Ga., 537 (7).

Judge Atkinson in discussing the issue on page 545 of this decision said:

"It was contended that the court erred in refusing a request to give the following in charge: 'The defend-

ant is entitled to recover from the Georgia Railway & Electric Company the fair market value of the property taken, the land and also the clay in the land, if there be any, as such value may appear from the sworn evidence in the case.' There was no error in refusing this request. So far as the land taken is concerned the fair market value was the measure. In determining such value the clay which formed a part of the land was a legitimate subject for consideration by the jury. Land containing valuable clay deposits may be of greater market value than if it did not do so. But the land and the clay in the land constitute one subject, and there can not be a recovery both for the land as such and also for the clay in the land. Both are to be considered in determining the value of the land, but there should not be a recovery for each as a separate subject-matter."

"In determining just compensation for land containing limestone deposits taken by the Government for dam and reservoir project, evidence as to the quantity and quality of the limestone deposits was relevant and material, and could be considered only in so far as it affected the fair market value of the property on the date of taking, which necessarily depended upon whether the land was reasonably suitable as a quarry site and whether a market for the stone existed or was so reasonably probable as to affect the market value of the land at the time of taking."

U. S. vs. 620 Acres of Land, 101 Fed. Sup., page 686 (5).

"While testimony as to the quantity and quality of limestone deposits of land taken by eminent domain was admissible, testimony as to value should be directed to establishing the price which a willing buyer would have paid a willing seller for the land at the date of taking."

Supra (13).

"The owner of land is entitled to receive the fair market value of the property as it stood on the date of the taking, not what she might have been able to realize from the property over a period of years in

the event she were able to install or have installed equipment for quarrying and in the event stone could have been sold on the market by the operator of such quarry, unless ... such would have probably happened and would have been considered in fixing the market price.

"... but in determining the market value you may consider any enhancement in value, if any, because of the existence of stone and other building materials in commercial quantities on the land at the time of the taking and which would influence and add to the market price, if any, that would be agreed upon between a seller and a prospective purchaser, keeping in mind the needs and commercial market, if available, ..."

Supra, page 690.

In Orgel on Valuation, under Eminent Domain, page 544, we find the following:

"... But more often the owner contends that the proper way to arrive at the market value of the property is to estimate the amount of stone in situ and to multiply this amount by a fixed price per unit. This method is uniformly rejected."

The author cites Serle vs. Lackawanna & Baltimore R. R. Company, 33 Pa., 57, and quotes rather extensively from that case. In rejecting the measure of multiplying the estimated amount of clay by a fixed price per unit, the author largely based his conclusion on the speculativeness of the method.

The plaintiff in the present case may argue that the speculative feature is eliminated by the fact that it established a market price for clay on a royalty basis. This argument is not conclusive or persuasive. The same elements would apply when based on royalty payments as price for finished products. The question of whether or not the holder of the lease would mine the clay and pay the royalties would depend upon the condition of the mar-

ket, the uncertainty of the future, the demand for the product, and many other elements, on and on, in the future.

Having concluded that the plaintiff is entitled to recover the difference between the value of the land at the time of the lease and its diminished value because of its use and the condition in which it was returned, it then becomes necessary to endeavor to arrive at the fair market value of these lands as of October, 1940.

There are many elements that go to make up market value. As was said by Judge Waller in U. S. vs. Savannah Ship Yards, Inc., 142 Fed (2nd), 863:

> "There is no trial in which a jury has more latitude in the consideration and in the fixing of its verdict than in a condemnation case involving property for which there is no established market value. The jury is required to find what is just compensation even though the evidence on the issue is scant and unsatisfying. With most juries theories and fictions give way to realities, and their verdicts in such cases are often a composite of evidence, guessing by the witnesses, and personal knowledge and guessing by the jurors. The experts and near-experts guess. Their opinions, in addition to being mostly guesswork, are further often tinged by partisanship or selfish interest. So the jury, finding itself in the midst of a guessing contest, attempts to evaluate the guesswork, but finding only confusion by that process, the jurors then usually bring to bear their own general knowledge and common sense, and thus a figure is reached which, more often than not, fulfills the constitutional command to make just compensation for private property taken for public use. The rules of evidence relating to the proof of fair market value are elastic as are the conscience and opinion of the partisan experts, but out of the conflict and confusion of opinions, facts and theories, the common sense of the jury is the 'anchor to the windward.' Neither the condemnor nor condemnee may be non suited. One has the right to take and the other has the right to be made whole for the taking."

As already stated, there are numerous elements that go to make up the value, and there are numerous different

values for different properties. The character of the land, the improvements thereon, the nearness to towns or cities, the accessibility to shipping and highways, fertility of the soil, the nature of the terrain, and the deposits in the earth, and the prevailing price of comparable real estate in the community in which the lands in question are located, are all elements to be taken into consideration when arriving at fair market value, and, therefore, just compensation.

It is conceded that the lands here in question are kaolin lands, that is, contain kaolin and that they are most valuable for that purpose. The Willingham-Birdsey tract sold in April, 1940, a few months prior to the lease, for $25,000.00, or $37.31 per acre. Between the years 1935 and 1941, the plaintiff took options in this kaolin section of kaolin lands on a total of 3,011.5 acres at $5,592.00, or an average of $18.30 per acre. During that period, there were three other options to other kaolin people in the immediate vicinity for a less acreage at $32.50 per acre. Between those same years, the plaintiff bought seven tracts of kaolin land, aggregating 2,573.5 acres, at an average price of $26.15 per acre. There were two other sales made of kaolin land to kaolin people in this period and in this vicinity at an average price of $17.40 per acre. It was generally agreed that the lands in the kaolin section of Georgia, particularly Twiggs County, that did not contain kaolin were poor and unfertile and of a value from $8.00 to $10.00 per acre for farm purposes in 1940. The evidence disclosed that generally kaolin lands sold in that section for about three times what farm lands sold for, and on an average of $20.00 to $30.00 per acre. Being required under the law and the contract to fix the value as of October, 1940, and taking into consideration the price paid for the property and all the other legitimate elements, including the fact that it was kaolin land and contained kaolin, I am of the opinion that said lands on said date, to-wit, October, 1940, were *worth $50.00 per acre* and had a market value of $40,750.00.

The plaintiff's suit being based upon the assertion that

the defendant breached its contract by returning its lands to it in an unfit, unsafe, untenable and, therefore, worthless condition, and that issue being heatedly disputed by the defendant, it is necessary for me to further determine to what extent the lands had been damaged by the defendant and the condition in which they were returned.

It is *conceded* by the defendant that 56.5 acres are infested by duds and unexploded shells and missiles to the extent that it has been surveyed and marked off as a restricted area, and plaintiff is entitled to compensation for the full value of this acreage.

There is a *direct and uncompromising conflict in the evidence* as to whether the balance of the land was returned to the owner in an unfit, unsafe, untenable and, therefore, dangerous condition, the plaintiff contending that the defendant did return the lands to it in that condition, and further contending that the lands cannot be used for two reasons; first, because of its inability to get the overburden removed, and, second, because plaintiff is unwilling to subject contractors or employees to the hazards incident to clearing the overburden because of the alleged existence of duds and unexploded missiles.

After hearing evidence from both sides, expert and non-expert, most of which was highly technical and very impressive, the Court *gravitated towards* and finally reached the conclusion that, actually and technically, the lands outside of the restricted area are practically, or, according to one of the experts, ninety-nine per cent free of duds and explosives, and that the lands can be used for the purpose for which they were bought and are capable, and that the overburden can be removed with safety to life and limb, *if* the machinery with which it is removed is provided with protective steel, as outlined and recommended by the experts.

Notwithstanding my conclusion that fundamentally the lands are approximately free from harmful and dangerous missiles, there is the belief definitely fixed in the mind of

the owner *and in the minds of the public* that there are located in the lands duds and unexploded shells and missiles, and that the working of the same, and particularly the removing of the overburden on the same, would be hazardous and dangerous, and this conception in the minds of the owner and the public, to my mind, *certainly and definitely diminishes the market value* to the extent of fifty per cent.

I conclude, therefore, that the plaintiff is entitled to recover one hundred (100%) per cent for the market value of the restricted area, and fifty (50%) per cent of the market value of the balance. If these lands had been bought for agricultural purposes, my findings would relate to 360 acres alone, that being the largest provable acreage containing mercantable kaolin. The tract being bought as a whole and for the specific purpose of mining kaolin, and being of little value for agricultural or other purposes, the whole tracts are considered together.

The plaintiff further contended, backed by respectable authority, that in arriving at the market value of the lands we should take into consideration and incorporate in the amount the value of deposits or kaolin, although unknown at the time of the purchase, but subsequently discovered.

The plaintiff cited as authority for this position the case of Board of Waterworks Supply of the City of New York vs. Coykendall Quarry, 209 Appellate Division N. Y., 231, the first headnote reading:

> "If land appropriated contains valuable deposit unknown at the time of taking, but discovered prior to decision fixing loss, owner is entitled to have value of deposit included in his damages."

If this were the correct rule generally, *we do not believe it is applicable in the present case,* for the reason that the contract between the parties, and upon which plaintiff predicates its case and upon which it relies, contains the following provision:

> "Any and all claims for damages to the leased premises and under the terms hereof are determinable ac-

cording to the *value* of said premises *as of the date of this lease.*"

My conclusion is that the proper measure of damages is the difference between the market value of the lands at the time of the lease and the diminution of that value caused by their use by the lessee and because of the *unsafe* condition in which they were returned to the owner.

My conclusion is, that the measure of damages, and the amount the plaintiff should recover, is the difference between the fair market value of the lands, at the time of the lease, and that value as diminished on account of or by the defendant's use thereof, or, to state it another way, the amount of injury the lands suffered, *because the defendant failed to restore,* as its contract required.

In arriving at the facts and reaching the conclusions herein expressed, I am not unmindful that the plaintiff has, for drillings, testings, chemical and laboratory work, analyses and research, for technical and expert aid and testimony, in the preparation of plats and maps, disclosing and revealing evidence of a tremendous amount of investigation, labor, thought and study, the expense of fees of Attorneys for the preparation and trial of this lengthy case, expended a sum, probably, much in excess of the amount of the judgment herein rendered. Of this, however, I can only allude to as showing my understanding and appreciation of the plaintiff's financial plight, under the theory it urges and relies on, and in which it seemingly confidently believes. But I cannot take that into consideration in arriving at legal damages, fair market value and just compensation.

My *troubled* state, due to the divergent views had and maintained by the plaintiff and those reached and declared by me, is appeased and calmed by the certain knowledge that *the controlling question on* the amount of recovery is *the measure of damages applied.* If my conception and application of the measure of damages are correct, the judgment rendered is not only just, it is full almost to overflowing, and the reviewing court will so adjudge. If the

plaintiff is correct, that the measure of damages is the yards of clay times the royalty value of 20¢, the reviewing court will reverse and remand. If I am right, the judgment is just and adequate. If the plaintiff is right, it has suffered heavy loss which the judgment will not compensate. If my findings are correct, fair and just, and my conclusions are legal, I shall not fret or chafe at the results.

It Is Therefore, Ordered and Adjudged, That the plaintiff, Georgia Kaolin Company, recover of the defendant, United States of America, the sum of $21,787.50, which is $50.00 per acre for the 56.5 acres within the two restricted areas, amounting to $2,825.00, and $25.00 per acre for the remaining 785.5 acres, amounting to $18,962.50, the two sums aggregating the amount of the judgment, with cost against the defendant.

Let formal judgment be prepared and entered accordingly.

This day of December, A. D. 1952.

A. B. Conger
United States District Judge.

[Final Judgment entered January 5th, 1953]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14592

GEORGIA KAOLIN COMPANY, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Middle District of Georgia.
(June 23, 1954.)

[Rehearing Denied August 5, 1954]

Before HOLMES and STRUM, Circuit Judges, and THOMAS, District Judge.

HOLMES, Circuit Judge: This is an action against the United States for damages that resulted to appellant's lands while occupied by the Government and used as a part of Camp Wheeler in Twiggs County, Georgia, which camp was utilized in the training of soldiers during World War II. The jurisdiction of the court below rested upon a special jurisdictional act of June 19, 1948, 62 Stat. 566. The jurisdiction of this court rests upon Section 1291, Title 28, of the U. S. Code.

In October, 1940, the appellant leased to the City of Macon, Georgia, two certain parcels of land. At the time of entering into the lease, it was understood between the parties thereto that the lease would be transferred to the United States and the lands used by it as a military training base. The contract of lease provided that the lessee would restore the premises to the same condition as that existing at the date of the lease, reasonable and ordinary wear and tear, and damage by the elements or by circumstances over which the lessee had no control, excepted; that all claims for damages to the leased premises were determinable *according to the value thereof as of the date*

of the lease; that no such damage should be determined upon the basis of appreciated value occasioned by the use or development of said property or surrounding property by the lessee or sublessee; and that, if the same was transferred or sublet to the United States, the lessor would have the right to assert such claim for damages solely and exclusively against said sublessee.

Under the transferred lease, the United States took possession of said property during the latter part of October, 1940, and retained and used the same until February 15, 1947, when the lease contract was duly terminated. The suit was filed against the United States on May 30, 1949, alleging that it had used the lands for a maneuver area and firing range, and had caused the property to become impregnated with live shells and dangerous explosives to such extent that the plaintiff could not thereafter use the lands for mining purposes. The appellant further alleged that it had acquired said property for mining kaolin thereon, and that the Government had breached its contract by failing to restore the premises to their same condition as when entered. *It is conceded that both tracts of land were acquired for kaolin, that the appellant is in the kaolin business, and acquired these lands in the belief that they contained kaolin. The appellant's evidence discloses that, in the particular section of Georgia wherein these lands are situated, the principal kaolin industry of the country exists and kaolin lands are very valuable.*

There is ample and substantial evidence in this record to support the district court's *findings of fact. The question of the measure of damages is one of law about which the parties sharply disagreed in the court below, and are still in disagreement.* The appellant contends that it ought to be paid the full money value of the kaolin in the ground, arrived at in money per ton, on a comparable royalty basis; but we think that such a computation would involve too many conjectures, and too vague and contingent a method, to meet the reasonable cerainty that the law re-

quires in fixing damages for the breach of a contract. We agree with the appellee, as did the court below, that the tonnage and royalty basis for establishing damages to the appellant's land was not the legal method, but that the value at the date of the lease, contemplated by the parties, *was the* MARKET value for any and all purposes and uses to which the lands could legally be put; and that, while the fact that the lands contained kaolin should be given weight, it should not be considered *apart* from other proper elements of value. *Their kaolin content was simply* ONE *of the many elements that went to make up the value of the lands at the time of the lease.*

It was conceded by the parties in the court below that the best and most valuable purpose for which the lands could be used, at the time of appellee's acquirement thereof, *was the mining of kaolin.* They were located in a kaolin section, and were bought and sold as kaolin lands, albeit to some extent *as a matter of speculation.* In arriving at the amount to which the appellant was entitled because of the government's *breach* of its contract to restore the lands to their former condition, the court below *applied the same general principles as are applicable in condemnation cases,* wherein the measure of compensation to be awarded the owner is the price which would be agreed upon at a voluntary sale between an owner, ready, able, and willing to sell, and a purchaser, ready, able, and willing to buy, *both being duly informed.* In other words, the applicable test is the fair market value. How market value is to be determined depends upon a number of circumstances. 156 A.L.R. 1416.

In eminent domain proceedings, the existence of valuable mineral deposits in the condemned land constitutes an element which may be taken into consideration *if and in so far as it influences the market value of the land.* The reason for this rule is said to be that the measure of compensation in such cases is the MARKET value of the land to be condemned, taken as a whole and with due consideration of *all* the components that tend to make its *market* value. This rule has been applied to limestone deposits,

gold ore, fire clay, coal, stone, and sand and gravel, 156 A. L. R. 1416-17; but there can be no recovery for both the value of the land and its mineral deposits as two separate items. *Atlanta Terra Cotta Co.* v. *Georgia Ry. & El. Co.*, 132 Ga. 537; *U. S.* v. *620 Acres*, 101 Fed. Supp. 686; Orgel on Valuation, under Eminent Domain, page 544, rejecting the method of estimating the amount of stone in situ and multiplying this amount by a fixed price per unit; also citing *Serle* v. *Lackawanna & Baltimore R. R. Co.*, 33 Pa. 57. In rejecting the method of multiplying the estimated amount of clay by a fixed price per unit, the conclusion is largely based on its speculativeness. In discussing this point, the court below said that whether or not the deposits would be mined and the royalties paid would depend upon the condition of the market, the uncertainty of the future, the demand for the product, "and many other elements, on and on, in the future."

Having concluded that the appellant was entitled to recover the difference between the value of the land at the time of the lease and its diminished value because of its use and the condition in which it was returned to the owner, the court below painstakingly endeavored to arrive at the fair *market* value of these lands as of the date of the lease in October, 1940, quoting from *U. S.* v. *Savannah Ship Yards, Inc.*, 140 F. (2) 863, upon the many elements that go to make up market value. We have carefully considered the court's findings and conclusions in this respect, and deem them to be correct and sound. They are free from reversible error. Accordingly, the judgment appealed from is affirmed.

AFFIRMED.

A True copy:
Teste:

OAKLEY F. DODD,
Clerk of the United States Court of Appeals for the Fifth Circuit.

The Enabling Statute Under Which This Action Was Brought

[Chapter 589]
62 Stat. 566

AN ACT

To confer jurisdiction upon the District Court of the United States for the Middle District of Georgia to hear, determine, and render judgment on the claims of the owners of the fee-simple titles and leasehold interests in lands leased to the United States by the city of Macon, Georgia, for use as a part of the site of Camp Wheeler, Georgia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the District Court of the United States for the Middle District of Georgia to hear, determine, and render monetary judgment upon the several claims (1) of the city of Macon with respect to lands owned by the City and leased by the said city to the United States for use by the Army as a part of the site of Camp Wheeler, Georgia, for damages for the breach, if any, of its leases to the United States and (2) of the owners in fee simple and the owners of leasehold interests, except the city of Macon, in and to lands leased by them to the city of Macon, Georgia, and subleased by the city to the United States for such use. In the determination of the claims of the owners of the fee-simple titles and of leasehold interests in lands leased by them to the city of Macon and subleased by said city to the United States, the damages allowed, if any, shall be limited to the amounts to which such owners would have been entitled under the terms and provisions of their leases to the city of Macon: *Provided*, That claims of fee owners and leasehold owners, excepting the city of Macon, relating to the same property shall be joined in one action and the amount of damages allowed, if any, shall not exceed the amount that could have been recovered had all the interests in such

property been vested in one party. The claims of the city of Macon with respect to lands owned by it shall be determined under the terms and provisions of its leases of such lands to the United States. This Act shall be construed to waive the lack of privity of contract between the United States and the said fee owners or between the United States and the said leasehold owners; to waive the requirement of such leases to the city of Macon of notice by the lessors to the city in order for claims of restoration to be asserted, and to waive the immunity from suit of the United States in favor of the parties and with respect to the claims described in this Act, but not otherwise to affect any rights of the parties.

SEC. 2. Proceedings for the determination of these claims shall be had in the same manner as in cases against the United States of which the district courts of the United States have jurisdiction under the provisions of paragraph "Twentieth" of section 24 of the Judicial Code, as amended, but the monetary limit which is applicable in such cases shall not be applicable in the determination of these claims: *Provided,* That all suits hereunder shall be instituted within one year after the enactment of this Act.

Approved June 19, 1948.

Excerpts from Army Manual

1. War Department Training Memorandum 9-1904 (issued March 1944) p. 771:

"'Ammunition inspectors may sometimes be called on to destroy duds. Duds are marked where found with a red flag and then are reported. *Amateurs should leave duds strictly alone because components that have been initiated and have failed to function are extremely dangerous to handle.* They should not be moved but should be destroyed wherever found, if practicable. Should it be necessary to move a dud, great care should be taken not to cause movement of the internal parts. Such action may result in immediate explosion.'"

2. War Department Training Memorandum 9-1900 (issued June 1945) p. 321 et seq.:

"'In those rare cases in which it is necessary to remove a dud from any location before destroying it, all operations connected with this procedure should be done either by or under the direct supervision of personnel who are thoroughly familiar with the dangers of such an operation and who are qualified to do this work. *To move or* ROLL *an unexploded fixed projectile is to invite disaster,* as such an operation may cause movement of the internal fuse parts and may cause the projectile to explode. No attempt will be made to disassemble a round of unexploded ammunition except by personnel of the Ordnance Department who are specifically assigned to such work. * * * *The dud should be approached only by experienced personnel* and, without disturbing the dud, the explosive blocks carefully laid in intimate contact wth it.'"

"'Shell exploded on the ground surface without an earth cover of at least two feet may send fragments 1000 yards, and all within this danger zone will take cover when the charge is fired. Personnel should never be within 300 feet of a projectile when it explodes, even if suitable protection is at hand.'"

Fifth Amendment to the Constitution of the United States

ARTICLE (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CIRCUIT COURT OF APPEALS
5TH CIRCUIT

RULE 25 "*Oral Arguments*—1. The appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Not more than one hour on each side will be allowed for the argument, without special leave of the court; and the court may allow such less time as shall appear to it to be sufficient for a fair presentation of the questions involved in any case. Counsel will not be permitted to read from briefs, records, or decisions. The time allowed may be apportioned between counsel on the same side, at their discretion; but a fair opening of the case shall be made by the party having the opening and closing."